Holiday Inn, Kuching v Lee Chai Siok Elizabeth

HIGH COURT (KUCHING) — ORIGINATING MOTION NO KG 21 OF 1990
HAIDAR J
18 OCTOBER 1991

Labour Law *— Constructive dismissal — Test applicable — Jurisdiction of Industrial Court — Industrial Court committing error of law in applying wrong test — Industrial Relations Act 1967 s 20(1) & 3*

Labour Law *— Dismissal — Compensation — Award of compensation in lieu of reinstatement — Whether Industrial Court can award compensation when claim for reinstatement had been abandoned — Industrial Relations Act 1967 s 20(1) & (3)*

The applicant applied for an order of certiorari to quash an Industrial Court award for compensation and backwages in lieu of reinstatement to the respondent. The Industrial Court had found that the respondent had been dismissed without just cause or excuse by the applicants. The respondent argued that there had been 'constructive dismissal' in her case. She had, initially, in her representations, wanted reinstatement under s 20(1) of the Industrial Relations Act 1967 ('the IRA') but at the hearing before the Industrial Court, asked for damages in lieu of reinstatement.

Held, allowing the application:

(1) The Industrial Court had accepted the contract test as the proper test for 'constructive dismissal' and had found that the applicant was not in breach of contract. Its finding that there was unfairness and unreasonableness in the conduct of the respondent's employer showed that the 'unreasonabless test' was the basis of its decision. In wrongly deciding that there was a dismissal based on the 'unreasonableness test', the Industrial Court committed an error of law which goes to its jurisdiction. If it had applied the correct contract test, there would have been no 'constructive dismissal' and the Industrial Court would have no jurisdiction to act.

(2) The respondent cannot come within the provision of s 20(1) and (3) of the IRA as the legislature intended that recourse to the Industrial Court is only in respect of reinstatement and once reinstatement is no longer applied for, the Industrial Court ceases to have jurisdiction. The right to compensation must be an issue in representations for reinstatement and necessarily arises where the court would not order reinstatement. In this case, the respondent does not want reinstatement and there is no basis for awarding damages or compensation in lieu of reinstatement. The Industrial Court had therefore made an error of law affecting its jurisdiction.

A **[Bahasa Malaysia summary**

Pemohon memohon mendapatkan perintah certiorari untuk membatalkan award Mahkamah Perusahaan bagi pampasan dan gaji tertangguh sebagai ganti penempatan semula penentang. Mahkamah Perusahaan telah mendapati bahawa penentang telah dibuang kerja
B tanpa sebab atau alasan yang berpatutan daripada pemohon. Penentang berhujah bahawa pembuangan kerja konstruktif telah berlaku dalam kesnya. Pada mulanya semasa membuat perwakilan beliau mahu penempatan semula di bawah s 20(1) Akta Perhubungan Perusahaan 1967 ('Akta itu') tetapi semasa pembicaraan di hadapan Mahkamah
C Perusahaan beliau telah meminta ganti rugi sebagai ganti penempatan semula.

Diputuskan, membenarkan permohonan itu:

(1) Mahkamah Perusahaan telah menerima ujian kontrak sebagai ujian yang sepatutnya bagi 'perbuangan kerja konstruktif' dan
D telah mendapati bahawa pemohon tidak mengingkari kontrak itu. Keputusan Mahkamah Perusahaan yang kelakuan majikan penentang tidak adil dan munasabah menunjukkan bahawa 'ujian ketakmunasabahan' menjadi asas keputusannya. Mahkamah Perusahaan, dalam membuat keputusan yang salah bahawa pem-
E buangan kerja telah berlaku berasaskan 'ujian ketakmunasabahan', telah melakukan satu kesilapan undang-undang yang menyentuh bidang kuasa mahkamah. Jikalau ia menggunakan ujian kontrak yang betul, sudah tentu tiada 'pembuangan kerja konstruktif' berlaku dan Mahkamah Perusahaan tidak akan mempunyai bidang kuasa untuk bertindak.

F (2) Penentang tidak termasuk di dalam lingkungan peruntukan s 20(1) dan (3) Akta itu kerana badan perundangan bermaksud supaya permohonan dibuat kepada Mahkamah Perusahaan cuma berkenaan dengan penempatan semula dan apabila penempatan semula tidak lagi dipohon, Mahkamah Perusahaan tidak lagi
G mempunyai bidang kuasa. Hak untuk mendapt pampasan harus menjadi isu dalam perwakilan bagi penempatan semula dan semestinya timbul di mana mahkamah enggan memerintahkan penempatan semula. Dalam kes ini penentang tidak mahukan penempatan semula dan tiada asas untuk memberi ganti rugi atau pampasan sebagai ganti penempatan semula. Mahkamah Peru-
H sahaan telah membuat kesilapan undang-undang yang menjejas bidang kuasanya.]

Cases referred to

1 *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 (folld)
I 2 *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 91 (folld)
3 *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 (refd)

4 *Enesty Sdn Bhd v Transport Workers Union & Anor* [1986] 1 MLJ 18 (folld)
5 *Anisminic v Foreign Compensation Commission* [1969] 1 All ER 208 (refd)

Legislation referred to
Industrial Relations Act 1967 s 20(1), (3)

JC Fong (*Reddi & Co*) for the applicant.
Sunni Si (*Francis Wee* with him) (*Si & Wee*) for the respondent.

Cur Adv Vult

Haidar J: On 23 May 1991 the applicant, Holiday Inn, Kuching was granted leave to apply for an order of certiorari to remove into the court for the purpose of being quashed the Industrial Court Award No 255 of 1990 dated 25 September, 1990 given in Industrial Court Case No 1:4/4–325/87.

The award was for the sum of $49,005 in respect of backwages and compensation in lieu of reinstatement to the respondent, Elizabeth Lee Chai Siok, after making a 40% deduction for her contributory conduct for her dismissal without just cause or excuse by the applicant as ruled by the Industrial Court. The award was however, subject to the usual income tax deductions and CPF contributions, if any.

At the outset of the hearing, counsel for the respondent raised a preliminary objection on the applicant's application on the ground that the applicant had filed an application before the Industrial Court under s 33A of the Industrial Relations Act 1967 ('IRA') to refer a question of law to the High Court and such application is still pending and the present application before this court is substantially on the same issue and as such it should be viewed as an attempt by the applicant to abuse the process of the court. Mr JC Fong, counsel for the applicant, expressed surprise as he was not duly informed of the preliminary objection raised. However, he requested for an adjournment to get instructions from his client. Mr Francis Wee, counsel for the respondent, had no objection and I adjourned the hearing to 4 September 1991.

On 4 September 1991 Mr JC Fong informed the court that his client wished to proceed solely with the present certiorari application and his client will discontinue the application pending before the Industrial Court. In fact he had earlier notified the court and the respondent's counsel of his client's intention vide letter dated 2 September 1991. Mr Francis Wee, counsel for the respondent, indicated that in the circumstances he would not pursue the preliminary objection raised in the earlier hearing. I then directed this originating motion to proceed.

From the tone of the submission of Mr JC Fong, counsel for the applicant, in comparison to the grounds put forth in the statement filed, the principal grounds relied on to quash the award of the Industrial Court are:

(1) The Industrial Court having found that there was no constructive dismissal as alleged by the respondent has erred in law in proceeding to

find that the respondent had on a balance of probabilities been dismissed.

(2) The Industrial Court erred in law in finding that the respondent was dismissed and accordingly erred in assuming jurisdiction of the matter and thereby committing an error as to its jurisdiction.

(3) The Industrial Court has in breach of natural justice, failed to hear and/or consider the points raised by the applicant that —

(i) the Industrial Court no longer had any jurisdiction to determine the dispute referred to it when the respondent gave evidence that she wanted to continue working for her present employer (Hilton Hotel), that is, she did not want reinstatement to employment with the applicant;

(ii) there was no jurisdiction for the Industrial Court to grant compensation in lieu of reinstatement in view of the fact that the respondent did not want reinstatement.

(4) The Industrial Court in ignoring, failing to hear and/or consider the points mentioned in para 3 above has further failed to take into account relevant considerations, and has acted unreasonably and accordingly has exceeded its jurisdiction.

(5) The Industrial Court has committed errors of law affecting its jurisdiction when it continued to assert its jurisdiction when the respondent did not want reinstatement.

(6) The Industrial Court has acted without or has exceeded its jurisdiction in making the award dated 25 September 1990.

Before proceeding to consider the grounds put forth, it may be useful to set out the pertinent facts which would appear to be not in dispute. They are:

(a) The respondent was until 9 January 1987 engaged as a personal administrative assistant to the general manager, Holiday Inn, Kuching (see para 5 of the statement of case — exh A to Peter Muller's affidavit dated 3 November 1990).

(b) On 9 January 1987 she addressed a letter to the general manager, Holiday Inn, Kuching stating that, as demanded, she submitted her letter of resignation (see para 15 of the statement of case). The applicant did not issue the respondent with a letter of dismissal.

(c) The respondent referred the matter under s 20(1) of IRA to the Director General's office at Kuching for reconciliation alleging that she was constructively dismissed from her post.

(d) The matter of her dismissal was then referred to the Industrial Court under s 20(3) of IRA.

(e) The respondent is now gainfully employed with the Hilton Hotel, Kuching. She had worked there since 1 March 1988.

(f) In the course of the hearing before the Industrial Court, the respondent gave evidence to the effect that she was gainfully employed with the Hilton Hotel, Kuching and would like to continue working there (see p 21 of exh SCH–1 to encl 5).

(g) Her basic salary at the Hilton Hotel, Kuching was $2,380 per month compared with a basic salary of $2,200 per month at the Holiday Inn, Kuching.

(h) By para 16 of the statement of case, it is clear that the respondent's claim was on the basis of constructive dismissal. A

Jurisdiction of the Industrial Court

The powers of the Industrial Court in relation to dismissal are set out in s 20(1) and (3) of IRA. B

Section 20(1) and (3) read:

> (1) *Where a workman* irrespective of whether he is a member of a trade union or otherwise, *considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment*; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed. C
>
> (3) Upon receiving the notification of the Director General under subsection (2), the Ministry may, if he thinks fit, *refer the representations to the Court for an award.*
>
> (Emphasis added.)

D

The elements of representation would appear to be as follows:

(i) the respondent must be 'a workman' (see *Dr A Dutt v Assunta Hospital*[1]);

(ii) whether there was a dismissal and if so, it must be without just cause or excuse by his employer (see *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd*[2]); E

(iii) the workman has made 'representations in writing' to be 'reinstated in his former employment'.

The representations by the minister to the Industrial Court under s 20(3) of IRA must necessarily be *confined to representations for reinstatement* by virtue of s 20(1) of IRA. The power to make an award by the Industrial Court is provided by s 30(1) of IRA and reads: F

> The Court shall have power in relation to a trade dispute referred to it *or in relation to a reference to it under s 20(3)*, to make an award (including an interim award) relating to all or any of the issues. G
>
> (Emphasis added.)

It would clearly appear therefore that if a workman does not require reinstatement, there would not be reference to the Industrial Court under s 20(3) of IRA.

Element (i) and, so far as at the date of representations to the Industrial Court, element (iii) as well seem to be satisfied. The initial issue that needs consideration is whether element (ii) is satisfied, that is, whether the respondent has been dismissed or to use the phrase used by the respondent 'constructive dismissal'. H

Issue of constructive dismissal (grounds 1 and 2) I

As I said earlier it is not disputed that the applicant did not terminate her service as such but she claimed that she wrote the resignation letter *as demanded by Peter Muller*, the general manager of the applicant, and thereby

contended that the resignation letter was 'involuntarily written'. In the result she claimed that she was 'constructively dismissed' and this was the basis of her representations.

The word 'dismiss' is not defined in IRA and the Supreme Court in *Wong Chee Hong*'s case,[2] at p 95 touching on the word 'constructive dismissal' advised 'Perhaps in the context of our law, it is better that we do not use the terminology at all.' Be that as it may, *Wong Chee Hong*'s case[2] decided that the test to determine whether there was 'a dismissal' within the meaning of s 20(1) of IRA 'could not go beyond the common law test'. The Supreme Court said that when the Industrial Court is dealing with a reference under s 20, the first thing that the court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse. In determining the issue of dismissal the Supreme Court in *Wong Chee Hong*'s case[2] said that the test for 'constructive dismissal' is the contract test and rejected the 'unreasonableness test'. It would seem clear that the respondent's counsel as well as the learned Chairman of the Industrial Court agreed on the 'contract test' (see p 7 to exh 'C1' of Peter Muller's affidavit and p 30 of the award). Nevertheless the Industrial Court in spite of accepting the contract test, went on to hold that the respondent 'has been able to establish, on balance of probabilities, that there has been a dismissal'. It would appear from the judgment of the learned Chairman of the Industrial Court that such a finding was based on unfairness and unreasonableness of the conduct of Peter Muller. At p 30 of the award the learned Chairman admitted that the applicant was not in breach of contract per se but Peter Muller's actions had generated, contributed and/or aggravated the stress and tension in the working environment of the respondent. Clearly, in my view, the learned Chairman, after accepting that the contract test was the proper test to consider but not applicable in the present case, appeared to hold the 'unreasonableness test' as the basis of the respondent's dismissal even though the 'unreasonableness test' was rejected by the Supreme Court in *Wong Chee Hong*'s case.[2] With due respect, it would appear that the decision of the Industrial Court on 'the dismissal' was absurd or reached absurdly. It appeared to be devoid of plausible justification and clearly perverse because the case before the Industrial Court was not one of 'simple dismissal' (see *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor*[3]). As the Industrial Court ruled that there was no constructive dismissal, the logical and rational effect of such a finding would be that there was no longer any jurisdiction for it to deal with the matter. If the facts clearly disclosed that there was constructive dismissal based on the contract test as propounded by the Supreme Court in *Wong Chee Hong*'s case,[2] in my view the respondent need not even tender the alleged resignation letter but can simply walk out as in the case of *Wong Chee Hong*.[2] However, the facts in this case do not seem to support such a case.

In my view, in wrongly deciding that there was a dismissal based upon the 'unreasonableness test', the Industrial Court committed an error of law which goes to its jurisdiction because if it had applied the correct contract test there would have been 'no constructive dismissal' and as such the Industrial Court would have no jurisdiction to act. In this respect, Mohamed

Azmi SCJ, delivering the judgment of the Supreme Court in *Enesty Sdn Bhd v Transport Workers Union & Anor*,[4] said:

> There is no degree of nullity and if there is an error of law on which the Industrial Court's award depends, the remedy of certiorari should not be excluded by s 33B(1). In other words, if there is an error of law on which the award of the Industrial Court is founded, such error whether of interpretation or otherwise must necessarily be without jurisdiction or in excess of jurisdiction. Any decision in any award based on an invalid interpretation or construction of the law must surely be a nullity, and this must be construed as a nullity resulting from the Industrial Court doing or failing 'to do something in the course of the inquiry which is of such a nature that its decision is a nullity' as referred to by Lord Reid at p 171 in *Anisminic*'s case, or the court 'having asked themselves the wrong question' as referred to by Lord Diplock at p 187 in *Re Racal Communications Ltd.*

On these two grounds alone I will have no hesitation in allowing the applicant's application and quash the award accordingly.

Issue of damages/compensation in lieu of reinstatement (grounds 3(i), (ii), 4, 5 and 6)

These grounds can be conveniently dealt with together. It is essentially on the issue of reinstatement. As stated by me earlier, the respondent in her representations initially wanted reinstatement which is in accordance with s 20(1) of IRA but subsequently in the hearing before the Industrial Court, she changed her stand and instead asked for damages in lieu of reinstatement. In such a situation can the Industrial Court consider this aspect of her claim? In my view the respondent clearly could not come within the provision of s 20(1) and (3) of IRA as the legislature intended that recourse to the Industrial Court is only in respect of reinstatement and once reinstatement is no longer applied for the Industrial Court ceases to have jurisdiction. According to the case of *Dr A Dutt*,[1] 'the right to compensation must be an issue in representations for reinstatement and necessarily arises where the court would not order reinstatement.' In the case here the issue in representations for reinstatement no longer arises as the respondent clearly abandoned reinstatement in the course of the hearing before the Industrial Court. According to Chang Min Tat FJ in *Dr A Dutt*'s case[1] at p 304:

> *If a workman complains he has been dismissed without just cause or excuse*, it does mean that he is dissatisfied with his dismissal or termination of services and *he wants his job back*. However there may exist circumstances and reasons why reinstatement should not be ordered.
> (Emphasis added.)

In other words, for compensation for reinstatement to arise (i) the workman must 'want his job back'; and (ii) although the workman wants his job back, the Industrial Court would not order reinstatement.

In this case, the respondent clearly did not want her job back as she is now gainfully employed by Hilton, Kuching. Thus there is no basis for awarding damages or compensation in lieu of reinstatement. As I said earlier the right to compensation must be an issue in representations for

reinstatement. It would appear therefore that the Industrial Court made an error of law affecting its jurisdiction as up to the time of the award, there was no longer representations for reinstatement. Lack of jurisdiction may arise in various ways and this is what Lord Reid said in *Anisminic v Foreign Compensation Commission*[5] at p 233:

> There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. *Or the tribunal may at the end make an order that it has no jurisdiction to make.* Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity. Further it is assumed, unless special provisions provide otherwise, that the tribunal will make its enquiry and decision according to the law of the land. For that reason the courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such a case the courts have intervened to correct the error.
> (Emphasis added.)

In the circumstances of the case the Industrial Court no longer has jurisdiction to make an award on damages or compensation for reinstatement under s 30(1) of IRA as the respondent clearly did not want her job back with the applicant. The award of the Industrial Court would accordingly be quashed.

For the reasons set out by me I allow the application for an order of certiorari by the applicant with costs to be taxed unless agreed.

Application allowed.

Reported by Zarinah Marican